No. 09-17144

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ARMSTRONG, *et al.*,

Plaintiffs-Appellees

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

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STATEMENT OF THE ISSUES

1. Whether the Attorney General validly promulgated, pursuant to Title II of the Americans with Disabilities Act (ADA), a regulation that requires public entities to ensure that contractors comply with the ADA in carrying out their contracts.

2. Whether the regulation applies to the State's contracts with counties to provide incarceration of state parolees and prisoners.

3. Whether the district court's order violates principles of federalism and separation of powers.

INTEREST OF THE UNITED STATES

This appeal concerns California's obligations under Title II of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and the validity of the Attorney General's regulations promulgated to enforce Title II. Part A of Title II, 42 U.S.C. 12131-12134, prohibits public entities from discriminating against individuals with disabilities in the provision of public services. The ADA required the Attorney General to promulgate regulations implementing Part A. One of the regulations promulgated by the Attorney General, 28 C.F.R. 35.130(b)(1), which states that a "public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements" discriminate against people with disabilities, is at issue in this appeal. The United States also has significant enforcement responsibilities under the ADA.

STATEMENT OF THE CASE

1. The issues in this case arise from a class action suit originally filed in 1994. California state prison inmates and parolees with disabilities sued the California Department of Corrections and Rehabilitation (CDCR) and the Board of Parole Hearings (BPH), alleging violations of the Rehabilitation Act of 1973 (29

U.S.C. 794) and the ADA in state prisons. *Armstrong* v. *Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

In 1996, the district court ordered the appellants (or the State) to "develop plans to ensure that their facilities and programs were compliant with" the ADA and "readily accessible to and usable by prisoners and parolees with disabilities." *Armstrong* v. *Schwarzenegger*, No. 94-2307, 2009 WL 2997391, at *1 (N.D. Cal. Sept. 16, 2009). The district court further ordered the State "to develop policies to provide a prompt and equitable disability grievance procedure, to allow approved assistive aids for prisoners with disabilities in segregation units and reception centers, and to ensure accessibility in new construction and alterations." *Ibid.*

The State frequently houses parolees in county jails, and the State has "statutory and contractual relationships with all fifty-eight California counties which allow them to exercise some degree of control over the policies and procedures of county jails housing class members." *Schwarzenegger*, 2009 WL 2997391, at *2.

In 1999, the district court entered a permanent injunction

> as to those Defendants who are responsible for conducting parole proceedings of the Board of Parole Hearings (BPH, formerly known as the Board of Prison Terms), following trial and findings that Defendants were in violation of the ADA, Section 504 of the

> Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Due Process Clause of the Fourteenth Amendment.

Schwarzenegger, 2009 WL 2997391, at *1. The court held that the State could not

> avoid ADA and Section 504 liability by delegating responsibility for their delivery of programs, services and activities, or for the facilities in which they provide these programs, to the CDC [California State Department of Corrections and Rehabilitation] or any other entity. The implementing regulations of both the ADA and Section 504 prohibit covered entities from discriminating against individuals with disabilities "directly or through contractual, licensing, or other arrangements." The BPT [Board of Prison Terms] is thus legally obliged to ensure non-discrimination wherever programs, services or activities are provided to Plaintiff class members. Additionally, the BPT cannot avoid liability for violations of the physical accessibility standards by holding its programs in locations under the control of other entities.

Ibid. Thus, as to the Parole Board, the district court concluded that the State could not avoid ADA liability through subcontracting or licensing. The State subsequently appealed the resulting injunction but did not raise the question of contracting on appeal. See *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001), cert. denied, 537 U.S. 812 (2002).

In 2001, the State issued its remedial plan. The plan requires the State "to ensure that prisoners and parolees with disabilities are accessibly housed, that they are able to obtain and keep necessary assistive devices, and that they receive

effective communication regarding accommodations." *Schwarzenegger*, 2009 WL 2997391, at *1. In addition, the plan requires the State to "include language in all contracts that requires subcontractors to comply with the ADA." *Ibid.*

2. In May 2009, the plaintiffs, relying in part on the Department of Justice's (DOJ) Title II regulation concerning contracting, moved for an order requiring the State to "track and accommodate the needs of *Armstrong* class members housed in county jails and to provide access to a workable grievance procedure." *Schwarzenegger*, 2009 WL 2997391, at *1. That regulation, 28 C.F.R. 35.130(b)(1), states that a "public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements" discriminate against people with disabilities. The State argued that DOJ's Title II regulation was *ultra vires* and not entitled to deference because it conflicted with the language of Title II of the ADA. The State also argued that it was "not contracting with the county jails to provide any 'programs or services' subject to the ADA provisions," but rather contracting for incarceration. S.E.R. 437.

3. The district court rejected the State's arguments and upheld the application of the DOJ regulation to the State. The court held that the "ADA and the Rehabilitation Act expressly authorize agencies to promulgate implementing regulations." *Schwarzenegger*, 2009 WL 2997391, at *3. The district court held

that the regulations were entitled to deference because they were not "arbitrary, capricious or manifestly contrary to the statute." *Ibid.* (citation omitted).

The court further stated that in its 1999 findings of fact supporting the permanent injunction, it "determined that the Title II and § 504 regulations are applicable in this case and prevent Defendants from contracting away or delegating responsibility for ADA compliance to other entities." *Schwarzenegger*, 2009 WL 2997391, at *4. The district court noted that the State had "appealed the ruling to the Ninth Circuit, which upheld the relevant portions of the injunction," and that, therefore, "under the law of the case doctrine, the Title II and § 504 regulations are applicable and Defendants cannot shift their responsibility to provide ADA compliant facilities to county jail administrators." *Ibid.* (citing *Armstrong*, 275 F.3d at 873-874).

The district court also rejected the State's argument that "even if the regulations are valid, they apply only to contracts for programs and services, and do not cover contracts for incarceration." *Schwarzenegger*, 2009 WL 2997391, at *4. The district court stated that it was "well settled * * * that the ADA and § 504 apply to incarceration itself." *Ibid.* (citing *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998), and *Armstrong*, 124 F.3d at 1025).

4. The State appealed the district court's order. Both the district court and this Court denied motions for stay.

SUMMARY OF ARGUMENT

This Court should affirm the district court's order.

1. Title II of the ADA requires the Attorney General to promulgate implementing regulations. Pursuant to this responsibility, DOJ promulgated 28 C.F.R. 35.130(b)(1), which states that a "public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements" discriminate against people with disabilities. The appellants' argument that this regulation is contrary to the statutory language of the ADA fails. DOJ's regulation is fully consistent with the ADA. Title II expressly requires DOJ's Title II regulations to be "consistent with * * * the coordination regulations" for Section 504 of the Rehabilitation Act of 1973. 42 U.S.C. 12134(b). Those coordination regulations include a provision stating that recipients of federal funds "in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements" discriminate "on the basis of handicap." 28 C.F.R. 41.51(b)(1). This provision was originally promulgated in 1978, 43 Fed. Reg. 2132 (Jan. 13, 1978), and Congress can be presumed to have been aware of the text of these Section 504 regulations when it enacted Title II in 1990. By

requiring Title II's implementing regulations to be consistent with Section 504 regulations, Congress was prohibiting public entities from contracting away their ADA responsibilities. Thus, the DOJ regulation is not contrary to the statute nor arbitrary and capricious and is entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The appellants fail to raise substantive argument concerning the validity of the identical regulations promulgated pursuant to Section 504 of the Rehabilitation Act, and therefore have waived any appeal of that issue. Even assuming they have not waived this argument, it fails. The Rehabilitation Act regulations are consistent with the statute, and Congress explicitly endorsed these regulations. Similarly, they are due *Chevron* deference.

2. DOJ's Title II regulation applies to the State's contracts with county jails. DOJ's own interpretative guidance applies to precisely this type of contractual relationship. The State's argument that it is merely contracting for incarceration is misplaced. Numerous activities and services are attendant to incarceration, and appellees allege that they are being denied many of those services by virtue of disability.

3. The district court's order does not violate federalism or separation of powers principles. The district court has not required the State to entangle itself in

the operation of county jails, but quite properly requires the State to ensure that its programs comply with federal law.

ARGUMENT

I

THE ADA AND REHABILITATION ACT REGULATIONS ARE NOT CONTRARY TO THE ADA'S OR THE REHABILITATION ACT'S STATUTORY LANGUAGE, NOR ARE THESE REGULATIONS ARBITRARY OR CAPRICIOUS

A. The ADA And Rehabilitation Act Regulations

Title II of the ADA states that people with disabilities shall not "be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by such an entity." 42 U.S.C. 12132. The statute gives the Attorney General responsibility for promulgating regulations to implement that prohibition, 42 U.S.C. 12134(a), and states that the regulations are to be "consistent with * * * the coordination regulations" for Section 504 of the Rehabilitation Act of 1973, 42 U.S.C. 12134(b).

One of DOJ's Title II regulations, 28 C.F.R. 35.130(b)(1), states that a "public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements" discriminate against people with disabilities. Section 35.102 states that "this part applies to all services,

programs, and activities provided or made available by public entities." 28 C.F.R. 35.102.

DOJ's preamble further explains this language:

> All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR part 36.

56 Fed. Reg. 35,694, 35,696 (July 26, 1991).

The ADA also directs the Attorney General to develop "technical assistance manuals" interpreting the ADA's requirements and giving further guidance to individuals and entities covered by Titles II and III of the ADA. 42 U.S.C. 12206(c)(3). The Technical Assistance Manual for Title II employs the following example:

> ILLUSTRATION 4: A private, nonprofit corporation operates a number of group homes under contract with a State agency for the benefit of individuals with mental disabilities. These particular homes provide a significant enough level of social services to be considered places of public accommodation under title III. The State agency must ensure that its contracts are carried out in accordance with title II, and the private entity must ensure that the homes comply with title III.

The Americans with Disabilities Act Title II Technical Assistance Manual, II-1.3000, Illustration 4, available at, http://www.ada.gov/taman2.html#II-1.3000.

Section 504(a) of the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." 29 U.S.C. 794(a). Among the regulations promulgated to effect the Rehabilitation Act are the coordination regulations, which prohibit a recipient of federal funds from discriminating on the basis of disability "in providing any aid, benefit, or service * * * directly or through contractual, licensing, or other arrangements," 28 C.F.R. 41.51(b)(1), and DOJ's regulation using the same language, 28 C.F.R. 42.503(b)(1).

B. The ADA Regulation Does Not Conflict With The Statute

As the district court found, DOJ's regulations are entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Armstrong* v. *Schwarzenegger*, No. 94-2307, 2009 WL 2997391, at *3 (N.D. Cal. Sept. 16, 2009) (citing *McGary* v. *City of Portland*, 386 F.3d 1259, 1269 n.6 (9th Cir. 2004)). Congress expressly authorized the Department of

Justice to issue regulations implementing Title II of the ADA and to provide technical assistance to entities covered by the ADA. 29 U.S.C. 794; 42 U.S.C. 12134; see also 42 U.S.C. 12206. Where Congress has given "express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulation," such a regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844; see also *United States* v. *Morton*, 467 U.S. 822, 834 (1984) ("Because Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute."). A regulation receives *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). See also *Does 1-5* v. *Chandler*, 83 F.3d 1150, 1152-1153 (9th Cir. 1996) (addressing Title II regulations); *Helen L.* v. *DiDario*, 46 F.3d 325, 331 (3d Cir.) (same), cert. denied, 516 U.S. 813 (1995).

The State argues here that Title II's implementing regulations prohibiting a public entity from contracting away its ADA responsibilities "contravene

Congress's intent stated in Title II." Appellants' Br. 9. According to the State, "[n]othing in Title II suggests that Congress intended to broaden the scope of this prohibition to programs, services, or activities offered by a third party with whom the public entity has a 'contractual [or other] arrangement.'" Appellants' Br. 11. The State argues that "[b]y contrast, Title III * * * contains a provision barring the provision of unequal benefits either directly or 'through contractual, licensing, or other arrangements.'" Appellants' Br. 11-12 (quoting 42 U.S.C. 12182(b)(1)(A)(i)). Because Title II does not have the same "contractual" language that Title III does, the State argues, DOJ's regulation is contrary to the Title II's language. Appellants' Br. 11-12.

There is no conflict between the DOJ regulation and Title II's statutory language. Subsection (b) of 42 U.S.C. 12134 requires DOJ's Title II regulations to be "consistent with * * * the coordination regulations" for Section 504 of the Rehabilitation Act of 1973. 42 U.S.C. 12134(b). Those coordination regulations include a provision stating that recipients of federal funds "in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements" discriminate "on the basis of handicap." 28 C.F.R. 41.51(b)(1). This provision was originally promulgated in 1978. 43 Fed. Reg. 2132 (Jan. 13, 1978). See also 28 C.F.R. 42.503(b)(1) (DOJ regulation promulgated in 1980

prohibiting recipients of federal funds from discriminating "on the basis of handicap * * * directly or through contractual, licensing, or other arrangements"); 45 Fed. Reg. 37,620, 37,622 (June 3, 1980). When enacting the ADA in 1990, Congress also required that "nothing" in the ADA "shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 * * * or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. 12201(a).

Thus, when Congress required the Attorney General to promulgate regulations implementing Title II, and required them to be consistent with the Section 504's coordination regulations, Congress can be presumed to have been aware of the text of those Section 504 regulations. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."); see also *Bragdon* v. *Abbott*, 524 U.S. 624, 638 (1998) ("[T]he ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act."). The Third Circuit has stated that "because Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations, the former

regulations have the force of law." *DiDario*, 46 F.3d at 332. By requiring Title II's implementing regulations to be consistent with Section 504 regulations, Congress was requiring the same thing it explicitly required in Title III – that public entities cannot contract away their ADA responsibilities.

The legislative history of the ADA also shows that Congress acknowledged that the language of Title II was not as detailed as other ADA Titles. The House Committee on Education and Labor stated:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination", as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of "discrimination" set forth in section 102(b) and (c) and section 302(b) should be incorporated in the regulations implementing this title. In addition, however, section 204 also requires that regulations issued to implement this section be consistent with regulations issued under section 504. Thus, the requirements of those regulations apply as well, including any requirements such as program access that go beyond titles I and III.

H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 84 (1990); see also H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 52 (1990) ("Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to

prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited."); see also *Zimring* v. *Olmstead*, 138 F.3d 893, 897 (11th Cir. 1998) ("Congress left to the Attorney General the task of giving meaning to § 12132's broad prohibition on discrimination in public services."), aff'd in part and vacated in part on other grounds, 527 U.S. 581 (1999). Congress intended the language of Title II to be less specific than other ADA provisions in order to allow the Department of Justice to employ its special expertise in this area to promulgate specific and effective regulations.

The State's reliance on *Zimmerman* v. *State of Oregon Department of Justice*, 170 F.3d 1169 (9th Cir. 1999), cert. denied, 531 U.S. 1189 (2001), is misplaced. In *Zimmerman*, the Ninth Circuit held that Title II of the ADA did not reach public employment. *Id*. at 1178. Title I of the ADA, which specifically covers both public and private employment, incorporates a detailed administrative and judicial procedure for enforcement. Because Title II contains no such enforcement procedure, the *Zimmerman* court concluded that to permit suits for employment discrimination under Title II would undermine the carefully crafted Title I procedures. *Id*. at 1177-1178. The State contends, by analogy, that the failure of Title II to use the same language as Title III on contracting demonstrates

that Title II does not reach a public entity's contracting activities. But unlike Title I, Title III covers only private entities and does not overlap with Title II, which covers only public entities. The Title III provisions prohibiting *private* entities from avoiding the statutes' prohibitions through contractual means are not at all inconsistent with prohibiting *public* entities from engaging in the same conduct under Title II.

Moreover, *Zimmerman* stands for the uncontroversial proposition that statutory language and structure matter. *Zimmerman* articulates the principle that courts should "giv[e] full effect to each provision of a statute." 170 F.3d at 1177. Far from supporting the State's argument, *Zimmerman* supports the conclusion that DOJ's regulation is not contrary to the statute. The State's proposed reading fails to give Title II's language full effect. As demonstrated above, Title II's language reaches contracting; it simply does so by requiring Title II's regulations to be consistent with the Rehabilitation Act's coordination regulations. There is no conflict between DOJ's regulation and Title II's statutory language.

The appellants also assert that if "a county jail fails to reasonably accommodate an inmate's disability needs, the inmate" can bring an ADA lawsuit against the county. Appellants' Br. 18. While this is true, it does not support the State's argument that the regulation and statute conflict. Congress specifically

established that a private individual is able to bring suit against the public entity contracting out the service or program, but that point is hardly relevant here, as the two enforcement avenues do not conflict. And, in this circumstance, an inmate has no control over where the state houses him or her, permanently or temporarily. It is hardly unfair or unreasonable for inmates to be able to bring suit against the State or for the State to be held responsible for its inmates' ADA rights when the State is solely responsible for the inmate's placement and its duration.

C. The ADA Regulation Is Neither Arbitrary Nor Capricious

As explained above, DOJ's regulation was required by Title II's clear statutory language. A regulation can hardly be arbitrary or capricious where Congress requires its language. See, *e.g.*, *Henry Ford Health Sys.* v. *Shalala*, 233 F.3d 907, 913 (6th Cir. 2000) (agency's action could "hardly be deemed" to be "arbitrary and capricious" where agency action premised on a Congressional amendment to a statute); *Western Coal Traffic League* v. *United States*, 719 F.2d 772, 778 (5th Cir. 1983) (regulations "[a]dopted pursuant to congressional mandate" could not "be considered arbitrary, capricious, an abuse of discretion, or inconsistent with law"), cert. denied, 466 U.S. 953 (1984).

D. The Rehabilitation Act Regulations Governing Contracting Are Valid

The State also appears to suggest that the Rehabilitation Act's regulations prohibiting public entities from contracting away their Rehabilitation Act responsibilities are contrary to that statute, but they make no substantive argument other than referring to it in passing. Appellants' Br. 9-10, 11 n.2. As an initial matter, this failure to develop a substantive argument means they have waived this argument. See, *e.g.*, *United States* v. *Kimble*, 107 F.3d 712, 715 n.2 (9th Cir.) (arguments that are "not coherently developed" in an appellate brief are deemed "to have been abandoned"), cert. denied, 520 U.S. 1282 (1997).

Even assuming the State has sufficiently raised this argument, it fails. The Rehabilitation Act regulations prohibiting a recipient of federal funds from discriminating on the basis of handicap "in providing any aid, benefit, or service * * * directly or through contractual, licensing, or other arrangements," 28 C.F.R. 41.51(b)(1); 28 C.F.R. 42.503(b), are perfectly consistent with the Rehabilitation Act. Unlike the State's unavailing arguments concerning the differences between ADA Titles II and III, the State alleges no such inconsistency in the Rehabilitation Act. Nothing in the Rehabilitation Act's language is contradicted by the regulation requiring public entities to ensure that their contractors fulfill the Rehabilitation Act requirements. Under *Chevron*, the regulation is not arbitrary, capricious, nor

contrary to the statute. Indeed, Congress has explicitly endorsed Section 504's regulations. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984) ("[T]he responsible congressional committees participated in [the] formulation [of these regulations], and both these committees and Congress itself endorsed the regulations in their final form."); S. Rep. No. 890, 95th Cong., 2d. Sess. 19 (1978) (noting that the "regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under title VI" of the 1964 Civil Rights Act).[1] Congress has also implicitly endorsed Section 504's regulations through Section 504's frequent amendment without disturbing the regulation forbidding the contracting away of Rehabilitation Act responsibility. *Forest Grove School Dist.* v. *T.A.*, 129 S. Ct. 2484, 2492 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)); 29 U.S.C. 794 (1973) (amended and/or extended 1986, 1988, 1992). Thus, the State's argument fails.

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[1] Title VI's regulations include a similar limitation on contractual relationships. See 28 C.F.R. 42.104(b)(1) ("A recipient to which this subpart applies may not [discriminate], directly or through contractual or other arrangements, on the ground of race, color, or national origin."). This regulation was first promulgated in 1966. See 31 Fed. Reg. 10,265 (July 29, 1966).

II

DOJ'S REGULATION APPLIES TO THE STATE'S CONTRACTS WITH COUNTIES TO PROVIDE INCARCERATION OF PAROLEES AND INMATES

By its terms, the ADA regulation applies to the services the county jails provide through contracts with the State to house parolees. DOJ's interpretation of this regulation is that it applies to these contracts – that the factual situation presented here is precisely the sort of "contractual, licensing, or other arrangement" to which the regulation was intended to apply. This conclusion is due substantial deference.

This Court, along with other circuits, has "construed the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does.'" *Barden* v. *City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (some quotation marks omitted) (quoting *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)), cert. denied, 539 U.S. 958 (2003); see also *Johnson* v. *City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998) (same); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997) (same). The Supreme Court has held that Title II applies to inmates in state prisons. *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

DOJ's conclusion that the regulation applies to the State's contracts with county jails is owed "substantial deference." *Oregon Paralyzed Veterans of America* v. *Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003) (quoting *Lal* v. *INS*, 255 F.3d 998, 1004 (9th Cir. 2001)), cert. denied, 542 U.S. 937 (2004). An agency's "interpretation of its own regulations" is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Miller* v. *California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)), cert. denied, 129 S. Ct. 1349 (2009). "In other words," the court "must defer to the [agency's] interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Ibid.* (quoting *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)); see also *United States* v. *Cinemark USA, Inc.*, 348 F.3d 569, 578 (6th Cir. 2003), cert. denied, 542 U.S. 937 (2004).

This means that the government's "interpretation of its own regulations, such as the Technical Assistance Manual, must also be given substantial deference and will be disregarded only if 'plainly erroneous or inconsistent with the regulation.'" *Miller*, 536 F.3d at 1028 (quoting *Bay Area Addiction Research* v. *City of Antioch*, 179 F.3d 725, 732 n.11 (9th Cir. 1999)). The same deference is

due preambles or commentaries accompanying the regulations since both are part of a department's official interpretation of legislation. *Stinson* v. *United States*, 508 U.S. 36, 45 (1993). Here, the government's interpretation of its regulation and its applicability to the State's contracts with county jails, is neither plainly erroneous nor inconsistent with the regulation. Rather, it is precisely the sort of situation anticipated by the regulation. As the Preamble, Technical Assistance Manual, and the regulation itself make clear, this regulation was meant to reach contracts such as those between the State and the counties.

To escape the coverage of the regulation, the State argues that "incarceration" is not a program or service. Appellants' Br. 13. It claims that it contracts with county jails simply to incarcerate parolees, and therefore, the regulation does not apply. Appellants' Br. 13. This argument is meritless.

Plaintiffs do not argue that they are being denied access to "incarceration" by virtue of their disabilities, but to the services and programs attendant to their incarceration. The State's argument directly conflicts with the Supreme Court's decision in *Yeskey*, 524 U.S. at 210, which explained that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit'

the prisoners (and any of which disabled prisoners could be 'excluded from participation in')."

In addition to alleging that they were in some instances denied access to the rooms in which the parole hearings were to be held, plaintiffs alleged that, when incarcerated in county jails, they were sometimes housed where showers and bathrooms are inaccessible to people with disabilities. *Schwarzenegger*, 2009 WL 2997391, at *4. These are services and programs for purposes of the ADA. See, *e.g.*, *Phipps* v. *Sheriff of Cook County*, No. 07-C-3889, 2009 WL 4146391, at *13-14 (N.D. Ill. Nov. 25, 2009) (finding showers, toilets, and sinks to constitute programs or services); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014, 1032-1033 (D. Kan. 1999) (describing "basic services" of the jail to include the use of the toilet, shower, recreational areas, and obtaining meals). The plaintiffs also allege that the eligibility criteria for the In Custody Drug Treatment Program excludes people who use wheelchairs and those with insulin-dependent diabetes. *Schwarzenegger*, 2009 WL 2997391, at *4. *Yeskey* used a drug treatment program as an example of a program provided by a jail, 524 U.S. at 211, and it clearly is the sort of program covered under Title II. The State's argument is without merit.

III

THE DISTRICT COURT'S ORDER DOES NOT VIOLATE PRINCIPLES OF FEDERALISM OR SEPARATION OF POWERS

The State argues that the district court's order "violates the long-recognized policy of judicial restraint towards prison administration." Appellants' Br. 14. They argue that "state agencies cannot be commandeered to enforce federal law." Appellants' Br. 14. As an initial matter, the State did not raise this argument in its opposition to the plaintiffs' motion to track and accommodate *Armstrong* class members in county jails, so it has waived it for purposes of appeal. See, *e.g.*, *Travelers Prop. Cas. Co. of America* v. *Conocophillips Co.*, 546 F.3d 1142, 1146 (9th Cir. 2008).

Even assuming this argument is preserved, the State's argument fails. Contrary to the State's argument, the district court's order does not require it to entangle itself in the operation of county jails. Rather, the district court's order requires the State to ensure that the *State's own programs* – including the programs it operates through county jails – comply with federal law. There is nothing unusual, unconstitutional, or overbearing about that. It is the State itself that has chosen to house its inmates and parolees in those jails. If the State is unwilling to accept its ADA obligations, it can simply stop using county jails.

We fully agree that state prison officials are to be given significant "deference in day-to-day prison operations due to separation of powers and federalism concerns." *Bahrampour* v. *Lampert*, 356 F.3d 969, 973 (9th Cir. 2004). But, as this Court has recognized, "[e]ven in light of recognized federalism concerns, * * * the plain language of the ADA * * * support[s] application of the statute[] to state prisons." *Armstrong* v. *Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). *Yeskey* makes clear that federal courts can impose prospective injunctive relief upon state prison systems under the ADA. 524 U.S. 206. And to the extent that the anticommandeering rule – the principle that the Federal government may not appropriate "the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *New York* v. *United States*, 505 U.S. 144, 161 (1992) – even applies to legislation like the ADA, adopted pursuant to the Fourteenth Amendment, the regulation and order at issue hardly commandeer the State. The anticommandeering rule prohibits the federal government from requiring a State to regulate the actions of private parties pursuant to federal law. See *Printz* v. *United States*, 521 U.S. 898 (1997); *New York*, 505 U.S. 144. It does not prohibit the federal government from requiring the State to comply with federal law in its own operations. See *Reno* v. *Condon*, 528 U.S. 141 (2000). And a State cannot create

for itself a constitutional defense to the application of federal law by the simple expedient of using contractors, rather than its own employees, to perform state functions. Cf. *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125, 1131 (2009) (speech is shielded from scrutiny as government speech whether government speaks directly or enlists private parties to deliver its message).[2]

[2] In arguing that the order interferes with its penological interests, the State asserts that it has "several legitimate reasons for temporarily housing parolees in county jails" and that the "ordered plan requires that parolees be removed from county jails to CDCR prisons if jails exhibit 'patterns' of ADA non-compliance." Appellants' Br. 19, 21. The issue the State raises here is simply not yet ripe for review. The order states that if and when the appellants "become aware of a class member who is housed in a county jail and not receiving needed accommodations, [they] shall immediately take steps with county jail staff to ensure that needed accommodations are promptly provided or transfer the class member to a facility that is able to provide accommodations." *Schwarzenegger*, 2009 WL 2997391, at *6. The State has not alleged facts suggesting that they have tried, but failed to ensure a county jail accommodate the ADA needs of state parolees and therefore have needed to move a parolee to a state prison. The difficulties the State contends will occur at that time need not be reviewed unless and until that situation arises.

CONCLUSION

The district court's order upholding the validity of the Title II and Section 504 regulations should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation required by Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(d). This brief was prepared using WordPerfect X4 and contains no more than 5966 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: January 13, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by FedEx, postage prepaid, to the following non-CM/ECF participant:

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